IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-

IN THE MATTER OF EDNA SMITH,

Appellant.

ON APPEAL FROM THE
SUPREME COURT OF THE
STATE OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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In the Matter of)
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Edna Smith,)
)
Appellant.)

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the Supreme Court of South Carolina entered March 17, 1977, which order publicly reprimanded appellant for allegedly unethical conduct. This disciplinary proceeding against a member of the bar of the State of South Carolina was initiated as an administrative proceeding. The complaint asserted no jurisdictional statute but only that appellant committed an "act of misconduct or has indulged in ... [a] practice which tends to pollute the administration of justice or to bring the legal profession or the courts into disrepute", constituting "solicitation in violation of the Canons of Ethics."[1]

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1. The full complaint and letter on which the complaint is based are appended hereto at 23a.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at ___ S.C. ___, 233 S.E.2d 301 (1977), and is appended hereto at 1a. The report by a three-member panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina recommending a private reprimand is unreported and is appended hereto at 15a. This recommendation was affirmed and a private reprimand administered orally on January 9, 1976, by the full Board of Commissioners.

Appellant, by an action in the federal district court, attempted to enjoin the disciplinary proceedings ab initio. That action was dismissed by the district court without reaching the merits, and the dismissal was affirmed on appeal by the United States Court of Appeals, American Civil Liberties Union v. Bozardt, 539 F.2d 340 (4th Cir. 1976). Three judges dissented from denial of a petition for rehearing en banc in an unreported opinion appended hereto at 28a. This Court denied certiorari, ___ U.S. ___, 97 S.Ct. 639 (1976).

JURISDICTION

A disciplinary complaint was issued naming appellant as respondent on October 9, 1974, by the Secretary of the Board of Commissioners on Grievances and Discipline of the South Carolina Supreme Court. On January 9, 1976, the Board issued a private reprimand to appellant. Acting on appellant's petition to expunge the private reprimand, and with no cross-petition to increase the punishment, the Supreme Court of South Carolina, sua sponte, administered a public reprimand to appellant on March 17, 1977.

Appellant had defended the allegations against her on the grounds that she was engaged in constitutionally protected free speech and associational activities and that the procedures denied her due process of law. The Supreme Court of South Carolina issued the public reprimand construing certain Disciplinary Rules to apply to her conduct and holding the Rules and the procedures by which punishment was rendered to be constitutionally valid as applied to appellant.

A notice of appeal was filed in the Supreme Court of South Carolina on April 15, 1977. 27a. By order dated June 15, 1977, the Chief Justice extended the time for docketing this appeal through July 11, 1977.

This Court has jurisdiction to consider this appeal by virtue of 28 U.S.C. §1257(2). The following cases sustain the jurisdiction of this Court: Bates v. State Bar of Arizona, 45 U.S.L.W. 4895 (1977); In re Griffiths, 413 U.S. 717 (1973); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61, n. 3 (1963).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are set forth in full in the appendix, infra, at 18a, as follows:

United States Constitution, Amendment One

United States Constitution, Amendment Fourteen, §1

Supreme Court of South Carolina, Rule on Disciplinary Procedure, §4

American Bar Association, Code of Professional Responsibility, Disciplinary Rule 2-103(D), adopted by the Supreme Court of South Carolina

American Bar Association, Code of Professional Responsibility, Disciplinary Rule 2-104(a), adopted by the Supreme Court of South Carolina.

QUESTIONS PRESENTED[1]

I. Whether the disciplinary rules as construed and applied to appellant are vague and overbroad and encroach upon first amendment associational activity by prohibiting attorneys from offering the services of the American Civil Liberties Union.

II. Whether the decision is in conflict with NAACP v. Button, 371 U.S. 415 (1963), and subsequent cases, which held that collective activity to assure meaningful access to the courts is protected by the first amendment unless the state demonstrates a compelling interest in support of the particular narrowly drawn regulation. Bates v. State Bar of Arizona, 45 U.S.L.W. 4895 (1977).

III. Whether the decision below conflicts with In re Ruffalo, 390 U.S. 544 (1968), in that the charges of which the appellant had notice did not state all the elements of the violations found after the hearing.

IV. Whether the decision is in conflict with Thompson v. City of Louisville, 362 U.S. 199 (1960), in that there was no evidence nor findings to establish all the elements of the disciplinary rules found to be violated.

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1. To the extent that the questions presented are more properly raised by a petition for certiorari, appellant requests that these papers be so treated. 28 U.S.C. §2103.

STATEMENT OF THE CASE

This matter is a professional disciplinary proceeding formally initiated on October 9, 1974. The complaint issued by the State Board of Commissioners on Grievances and Discipline alleged that appellant had committed "solicitation in violation of the Canons of Ethics" by writing a letter on August 30, 1973, which offered the services of the American Civil Liberties Union (ACLU). Appellant denied (and has throughout these proceedings denied) that she had committed "solicitation" and alleged other defenses, including the vagueness of the State rules and the protected associational character of her conduct.

A panel of the Board of Commissioners held a hearing on the Complaint on March 20, 1975. The panel filed a report recommending that appellant be found to have violated the Canons of Ethics for soliciting a client on behalf of the ACLU, not on behalf of herself. The panel recommended a private reprimand as discipline. After a hearing on January 9, 1976, the Board of Commissioners approved the panel report and administered the private reprimand.

Appellant petitioned the South Carolina Supreme Court to review and expunge the private reprimand. Review was granted. There was no cross-petition seeking an increased penalty, yet on March 17, 1977, the South Carolina Supreme Court entered its order adopting the panel report and, sua sponte, increasing the discipline administered from a private reprimand to a public reprimand.

Appellant is a black woman who was admitted to the South Carolina Bar in September, 1972. She is active in the ACLU of South Carolina.

In 1973, local and national newspapers reported that certain pregnant mothers on welfare in Aiken County, South Carolina, most of whom were black, were being sterilized or threatened with sterilization as a condition for continuing to receive Medicaid assistance. See "3 Carolina Doctors Are Under Inquiry in Sterilization of Welfare Mothers," New York Times, July 22, 1973, p. 30. Mr. Gary Allen, who was active in a number of community organizations, knew some of the Medicaid patients who had been sterilized. A local organization to which Mr. Allen belonged contacted appellant through the South Carolina Council on Human Rights, a private, non-profit organization, with which appellant was also associated, to request advice and assistance on behalf of the welfare mothers. In response to the request, appellant went to Aiken, where she met with Mr. Allen and with three women who had been sterilized in Aiken County, including Mrs. Williams, the subject of the alleged solicitation.

Following the Aiken meeting, appellant received several telephone calls and a letter from Mr. Allen, advising her that Mrs. Williams wished to bring suit, and appellant was requested by Mr. Allen to write to Mrs. Williams.[1]

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1. Mrs. Williams testified that she had not told Mr. Allen she wanted to bring suit; however, the uncontradicted testimony of appellant and Mr. Allen was that Mr. Allen had so advised her, and the tribunals below made

In response to this request, appellant wrote the letter of August 30, 1973, that is the subject of this proceeding. The letter contained the following paragraph, by which appellant was found to have committed "solicitation":

> You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Mrs. Williams, shortly after receiving this letter, went to Dr. Pierce's office for treatment for her child. Dr. Pierce's attorney was present, read the letter, and questioned her about litigation against his client. Mrs. Williams disclaimed any interest in a lawsuit, and at the attorney's direction called appellant from Dr. Pierce's office to so inform her. Appellant never made any effort to contact Mrs. Williams further. Two women subsequently sued Dr. Pierce, Doe v. Pierce, No. 74-475 (D.S.C. 1974), but neither were represented by appellant or her associate employed by the ACLU.[1]

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1. The letter to Mrs. Williams had been in the possession of Dr. Pierce's attorney since August of 1973, and was known to the South Carolina Assistant Attorney General, who represented other defendants in Doe v. Pierce,

(footnote continued to next page)

The factual basis for the public reprimand issued Petitioner is as follows:

> The evidence is inconclusive as to whether the Respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages. 6a. [The only way in which the ACLU would possibly receive financial benefit would be by receipt of a court award of attorney's fees.]

This was held to be in violation of two Disciplinary Rules:

(1) Disciplinary Rule 2-103(D), which, by its terms, solely prohibits an attorney from "knowingly assist[ing] a person or organization ... to promote the use of his services or those of his partners or associates." There was no finding that appellant or the ACLU ever promoted the use of her own

(footnote continued from preceding page)
in early April, 1974; however, the Attorney General did not forward the letter to the Board on Grievances and Discipline until August 19, 1974, after an attempt to have Doe v. Pierce dismissed for solicitation proved unsuccessful. The letter was forwarded by A. Camden Lewis, an attorney herein and for certain defendants in Doe v. Pierce.

professional services, or those of her associates.

(2) Disciplinary Rule 2-104(A), which, by its terms, states that an attorney who has given unsolicited advice "shall not accept employment resulting from that advice." There was never even any contention that appellant or anyone else accepted employment by Mrs. Williams.

Appellant raised the federal questions of her constitutional defenses in the answer and amended supplemental answer to the complaint. They were raised as exceptions in the petition for review filed with the State Supreme Court, pp. 2-3, and as questions presented in the brief on the merits to that court, pp. 1-2. See also, 1a-2a.

The Supreme Court of South Carolina found, by its adoption of the commission report, the evidence sufficient under the recited rules. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

I

> The Disciplinary Rules as construed, and as applied to appellant, are vague and overbroad in violation of the First Amendment and the Due Process Clause.

Edna Smith, appellant here, has been disciplined by the South Carolina Supreme Court for offering, gratis and at the express request

of another, the services of the ACLU to a person whom Ms. Smith had talked with earlier and whom Ms. Smith believed had a valid cause of action. Her conduct was wholly consistent with Canon 2 of the Code of Professional Rsponsibility,[1] and indistinguishable from the conduct of the attorneys offering the assistance of the NAACP in NAACP v. Button, 371 U.S. 415 (1963). Instead of taking the disciplinary rules at their face value and taking care to avoid trenching on constitutionally protected activity, the court below gave the rules a novel construction far beyond their obvious meaning and far beyond the contemplation of those who drafted the rules. The result is not only to punish appellant for engaging in protected activity but also to chill citizens in the exercise of their constitutional rights by putting lawyers on notice that the disciplinary rules -- their narrow terms notwithstanding--can be applied to the most time-honored traditions of advising citizens of their rights and of the availability of counsel.

The South Carolina Supreme Court by construing the disciplinary rules to cover protected activity, has rendered those rules necessarily vague and overbroad.

The decision below not only squarely contradicts this Court's decision in NAACP v. Button, 371 U.S. 415 (1963), and inflicts

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1. "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." See also Disciplinary Rules 2-104(A)(2).

personal obloquy upon appellant; if upheld, it also threatens to impair the legal assistance activities on behalf of civil liberties of the American Civil Liberties Union and its affiliated organizations. The ACLU, which is the oldest and largest organization in the nation devoted exclusively to the cause of civil liberties,[1] has for years stated frankly in The Guide for ACLU Litigation, ¶5, that:

> It is not necessary to await clients seeking out the Union; it is often better for the Union to take the initiative in civil liberties cases. NAACP v. Button, 371 U.S. 415 (1963), provides that organizations need not stand by while potential litigants forfeit through ignorance their constitutional rights. An organization with our purposes can thus advise people that it will handle cases for them.

The ACLU's opinion of its function is widely shared. Referring to the activities of appellant regarding the origin of Doe v. Pierce, the case subsequently filed on the Aiken sterilizations, the Honorable Sol Blatt, Jr., United States District Judge for the District of South Carolina, made the following

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1. See NAACP v. Button, 371 U.S. 415, 440, n. 19 (1963).

statement at a hearing on September 24, 1974:[1]

> This Court feels in its posture of [sic] the American Civil Liberties Union has a duty and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACLU, in contacting, if that in fact did happen. . . (Emphasis supplied.) Deposition of Mary Roe (Shirley Brown), Doe v. Pierce, No. 74-475 (D.S.C. 1974)(Sept. 24, 1974, p. 23).

Obviously, if the decision below is sustained, the ACLU and countless other legal assistance

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1. Three judges of the United States Court of Appeals for the Fourth Circuit reached a similar conclusion, 33a:

> The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available--are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities.

organizations[1] will be barred from affirmatively offering assistance to the poor and untutored. It was precisely the importance of protecting associational activity to foster meaningful access to the courts that guided this Court to the result of NAACP v. Button, supra, 371 U.S. at 429-31. See, Bates v. State Bar of Arizona, 45 L.W. 4895, 4902 n. 32 (1977). To affirm summarily this judgment would be to decide, without plenary consideration by this Court, that Button is overruled, in a decision binding upon courts throughout the nation, and endorsing a most expansive construction of these Disciplinary Rules, which have been adopted in most states.

In Button, the NAACP paid modest attorney's fees to its staff and cooperating attorneys in connection with desegregation lawsuits. The organization also sent these same attorneys to meetings of parents to encourage desegregation lawsuits. This Court held that activity to be protected, in a doctrine recently summarized in the Bates opinion, supra at note 32:

> The Court often has recognized that collective activity undertaken to obtain meaningful access

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1. The approach adopted in this case could be applied to the activities of the National Right to Work Defense Fund; the NAACP Legal Defense and Education Fund, Inc.; the Mexican-American Legal Defense and Education Fund; the Sierra Club Legal Defense Fund; the Natural Resources Defense Council; the National Chamber Litigation Center (U.S. Chamber of Commerce); the Puerto Rican Legal Defense and Education Fund; and the Native American Rights Fund, to name only a few.

to the courts is protected under the First Amendment. See United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222-224 (1967); Brotherhood of Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 7 (1964); NAACP v. Button, 371 U.S. 415, 438-440 (1963). It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them.

A. Vagueness. The fundamental error of the State Court construction is apparent from the Court's own statement of its findings:

> ...that [Appellant] had violated Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the Code of Professional Responsibility by soliciting a client on behalf of the American Civil Liberties Union.1a.

The State Court expressly declined to find that appellant had solicited the client on her own behalf. The prospective client never accepted the offer of assistance.

The most thorough examination of the cited Disciplinary Rules, 18a, will fail to disclose any provision of either rule that, on its face, prohibits an attorney from offering the legal assistance of an organization. DR 2-103(D) prohibits an attorney from allowing an organization to promote his own services -- nowhere does it appear that the Rule prohibits an attorney from offering the services of an organization, where there is neither allegation nor proof that the organization promoted the services of any particular attorney.[1] DR 2-104(A) prohibits an attorney from accepting employment, with certain exceptions. It gives no notice whatsoever, much less the fair notice required for due process of law, that it prohibits an attorney from offering the services of an organization to a person who never employed any counsel.[2]

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1. This section was drafted by the ABA to regulate group legal services and not the type organization considered in NAACP v. Button. See, Smith, "Canon 2: "'A Lawyer Should Assist the Legal Profession in its Duty to Make Legal Counsel Available.'" 48 Tex.L.Rev. 285, 306-10 (1970). The American Bar Association has substantially rewritten this section so that it now approves more explicitly the activities of pre-paid group legal services. 61 ABA Jo. 464 (1975).

2. Again with regard to notice, it should be pointed out that the ethical strictures on solicitation had received little enforcement in South Carolina prior to July, 1975. See, In re Bloom, 265 S.C. 86, 217 SE2d 143 (1975).

The only logical interpretation that appellant's counsel have been able to place upon the decision below is that the State Court adopted a general notion of "solicitation" that included any offer of legal services, whether or not specifically prohibited by the Disciplinary Rules, and then looked to DR 2-103(D)(1)-(5) for a definition of organizations authorized to offer legal services. If this was the approach below, it suffered the vice of vagueness on two counts: (1) the rules did not give fair notice of the definition of "solicitation" adopted, and (2) the rules did not give fair notice of the court's draconian construction of the exemptions.

B. Overbreadth. In Bates v. State Bar of Arizona, supra, 45 U.S.L.W. at 4903, a bar disciplinary proceeding, this Court recently reaffirmed the proper application of the doctrine of overbreadth as applied to protected (non-commercial) speech:

> First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. See NAACP v. Button, 371 U.S. 415, 433 (1963).

Appellant submits that the Supreme Court of California has adopted the correct standard as to whether a communication about obtaining legal services is presumptively protected: that the communication has any discernable purpose in addition to attracting business for the attorney's private law practice. Jacoby v. California State Bar, 45 U.S.L.W.

2529 (Ca. 1977); Belli v. State Bar, 10 Cal3d 824 (1974). Of course, measured by this standard, appellant's offer of the assistance of an organization was presumptively protected, and it therefore fell to the state to demonstrate both (1) that the state had a compelling interest in punishing the communication and (2) that the statute prohibiting the conduct was so narrowly drawn as not to be applicable to protected activity.

Instead of narrowly construing its Disciplinary Rules, the State Court construed them to prohibit any attorney from offering the services of any organization that has either of the following characteristics:

> (1) the organization has as a "primary purpose,"[1] [here construed as any major activity of the organization] the provision of legal services; and
>
> (2) the organization at any time, in any proceeding, prays for attorneys' fees awarded by a court against a defendant.

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1. There was testimony in the record to the effect that the purpose of the ACLU is to protect civil liberties, and to this end it engages, as did the NAACP, in Button, in public education, in legislative lobbying, and in litigation. The lack of fundamental fairness in the proceeding below was illustrated by the treatment of the issue of the purpose of the

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By these tests, the activity in Button, where the NAACP sent staff attorneys to meetings of parents to encourage school desegregation lawsuits, and paid modest fees to the attorneys for any lawsuits brought, was not protected.[1] Furthermore, under this

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ACLU. The Grievance Board curtailed appellant's attempts to describe the purposes of the ACLU, stating, "I don't think the underlying purposes of the American Civil Liberties Union really is germane to this inquirey [sic] at all." The Board and the Supreme Court, then, proceeded to rely on their own interpretation of the "primary purpose" of the organization as a crucial element in sustaining disciplinary action.

1. In lawsuits sponsored by the NAACP, whose conduct was sanctioned in Button, attorneys cooperating with the NAACP had been praying for court awards of attorney's fees for years, and the federal courts made such awards in many suits pending at the time of the Button decision. See, e.g., Bell v. School Board of Powhatan County, Va., 321 F.2d 494 (4th Cir. 1963)(en banc). Indeed , the complaints in County School Board v. Thompson, 240 F.2d 59 (4th Cir. 1956), and Allen v. School Board of Charlottesville, 249 F.2d 462 (4th Cir. 1957), both cases sponsored by the NAACP and cited by this Court in the Button decision, 371 U.S. at 435, n. 16, had prayed for awards of fees to the plaintiffs' attorneys. (See Appendices filed with the Clerk, U.S. Court of Appeals for the Fourth Circuit.) Congress recently found, (footnote continued to next page)

construction, the rule prohibits attorneys from accepting referrals of pro bono cases from the ACLU. A rule that destroys the ability of private attorneys to offer pro bono legal services through an organization plainly contradicts the first amendment. Compare, NAACP v. Button, supra, 371 U.S. at 440, n. 19.

II.

The decision below conflicts with NAACP v. Button in that the state offered no compelling state interest to justify punishing appellant for her associational activity.

The decision below is squarely and irretrievably in conflict with the decision of this Court in NAACP v. Button, 371 U.S. 415 (1963), as amplified in subsequent decisions. Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Association,

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in considering the "Civil Rights Attorney's Fees Awards Act of 1976," that:

> ... fee awards are essential if the Federal statutes to which S.2278 applies [42 U.S.C. §§1981 et seq.] are to be fully enforced.... [t]he effects of such fee awards are an integral part of the remedies necessary to obtain such compliance.
>
> 5 U.S. Code Congressional & Admin. News 5908, 5913 (1976).

389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). In Button, the NAACP sent its staff attorneys to meetings for the purpose of soliciting plaintiffs for civil rights lawsuits, particularly in school desegregation. The NAACP's purpose was "to secure the elimination of all racial barriers which deprive Negro citizens in equal citizenship rights...." To this end, the NAACP engaged in education, lobbying and "also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation..." 371 U.S. at 419-420. Ms. Smith was assisting the ACLU in doing no more. The only differences from Button are that here the ACLU is seeking to protect civil liberties, rather than the NAACP seeking to protect equal citizenship, and the incident occurred in South Carolina in the mid-1970's rather than in Virginia in the early 1960's.

If the State Court's regulation of the legal profession is to avoid constitutional infirmity, it must be upon a showing that the possibility that an attorney may be paid presents a "serious danger"; or more to the point, that the regulation is justified by a compelling state interest. No such factor was claimed or shown here. Nor, for these purposes, could even a rational distinction be drawn between organizations that have litigation as one major activity as opposed to organizations that do not. Nor has this Court ever suggested that organizations forfeit the protection of the First Amendment by availing themselves of remedies provided by Congress, such as praying, in proper cases, for court awards of attorney's fees.

III

The decision below is squarely in conflict with In re Ruffalo, 390 U.S. 544 (1968), in that fair notice of the charges was not given to appellant, and also in conflict with Thompson v. City of Louisville, 362 U.S. 199 (1960), in that not all the elements of the cited Disciplinary Rules were proved or found by the Court below.

A. Elements of the disciplinary violations.

Appellant was held to have "violated DR 2-103(D)(5)(a) by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization." DR 2-104(A)(5) was cited by the court below as proscribing the seeking, not the acceptance of employment, 9a. The State Court properly found that a violation of a particular disciplinary rule was necessary to sustain discipline. 1a.

DR 2-104(A) appears to require the following elements:

(1) giving unsolicited legal advice to a layman that he should take legal action, and

(2) accepting employment as a result of that advice.

No one has claimed appellant did the latter.[1] The former, by itself, is never proscribed.

Disciplinary Rule 2-103(D) requires the following elements:

> (1) that there be a person or organization that recommends, furnishes, or pays for legal services; and
>
> (2) that the lawyer knowingly assists that person or organization to promote the use of his services or those of his partners or associates.

Likewise, with respect to DR 2-103(D), the complaint did not allege that any organization was promoting the services of any particular attorney, including appellant or her associates.

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1. But the State Court held that the latter was not an element: "The seeking of and not the acceptance of employment is proscribed by DR 2-104(A)(5)." This is directly contrary to all known constructions of DR 2-104(A); see Smith, supra, at p. 16, n. 1, 48 Tex.L.Rev. at 295. In addition, the court below did not find that appellant sought employment for herself or her associates.

B. Notice of the elements.

In re Ruffalo, supra, established that bar disciplinary proceedings are quasi-criminal in nature, and require fair notice to the attorney prior to the hearing on the violation. At a minimum, this would require specification of the elements of the offenses alleged. In re Gault, 387 U.S. 1 (1967); Wolff v. McDonnell, 418 U.S. 539, 564 (1974). The disciplinary complaint in this matter never alleged most of the above-stated elements of the Rules found violated, nor did it refer to either disciplinary rules by number. It alleged simply that appellant had committed "solicitation" by sending a letter that offered the services of the ACLU.

With respect to DR 2-104(A)(5), none of the elements was alleged in the Complaint. With respect to DR 2-103(D), there was never any allegation that the ACLU was promoting the services of appellant or her associates. "The charge must be known before the proceedings commence." In re Ruffalo, supra, 390 U.S. at 551. The failure to specify either the Disciplinary Rules or the elements thereof prior to the hearing was a fatal defect.

C. Findings as to each element.

Thompson v. City of Louisville, supra, 362 U.S. at 206, established that it is "a violation of due process to convict and punish a man without evidence of his guilt." Here there is no evidence that appellant accepted employment, yet she is punished for violating DR 2-104(A), which requires acceptance as an

element. There was no finding that appellant or the ACLU promoted her own services or the services of her associates,[1] as expressl required by DR 2-103(D); instead, the State Court found that appellant solicited a client "on behalf of the ACLU," 6a. Under the Thompson case, then, it is clear that the finding of violations of both disciplinary rules contravened due process because an ess ntial element of the offenses was absent fro the proofs and the findings.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal, or, in the alternative, grant a writ of certiorari to review the judgment below.

Respectfully submitted,

LAUGHLIN McDONALD
NEIL BRADLEY
CHRISTOPHER COATES
RAY P. McCLAIN

ATTORNEYS FOR APPELLANT

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1. Contrary to the State Court opinion, 3a, appellant's associate, Mr. Buhl, who was a staff attorney for the ACLU, never represented any plaintiff in Doe v. Pierce.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In The Matter of Edna Smith . . . .Petitioner.

Opinion No. 20386
Filed March 17, 1977

PUBLIC REPRIMAND

Laughlin McDonald, of Atlanta, Georgia; Ray P. McClain, of Charleston; and Melvin H. Wulf, of New York, New York, for petitioner.

Attorney General Daniel R. McLeod and Assistant Attorneys General A. Camden Lewis and Richard B. Kale, all of Columbia, for respondent.

PER CURIAM: This matter is before the Court pursuant to an order, issued under Section 34 of the Rule on Disciplinary Procedure, granting petitioner's request for review of a private reprimand administered by the Board of Commissioners on Grievances and Discipline (Board). Petitioner is a member of the Bar of this State and the private reprimand was issued upon findings that she had violated Disciplinary Rules 2-103(D)(5) (a) and (c) and 2-104 (A)(5) of the Code of Professional Responsibility by soliciting a client on behalf of the American Civil Liberties Union (ACLU).

The grounds urged by petitioner defensively before the Board are basically the same as she now presents to have the findings and private reprimand by the Board set aside. These are:

1. Does the record sustain the findings of the Board that petitioner violated the cited provisions of the Code of Professional Responsibility?

2. Was petitioner's conduct protected by the constitutional guarantees of freedom of speech and association?

3. Is Rule 4(d) of the South Carolina Supreme Court's Rule on Disciplinary Procedure void for vagueness and overbreadth?

4. Did the complaint in this case give petitioner notice of the charge as required by due process of law?

5. Does the record sustain the findings of the Board that there was no retaliatory motive on the part of the office of the Attorney General in this proceeding?

We are convinced that the record amply sustains the finding of the Board that petitioner violated the Code of Professional Responsibility and that disciplinary action was required. While we affirm the findings of the Board that petitioner was guilty of unethical conduct, we conclude that the facts and circumstances are sufficiently aggravated to justify a public, instead of a private, reprimand. Accordingly, this opinion will be published in the Reports of this Court.

This matter was first heard before a Hearing Panel which filed its report and recommendations

with the Board. The following portions of the panel report, affirmed by the Board, set forth the material facts and correctly dispose of the issues presented in this appeal:

"The Respondent, Edna Smith, is a practicing attorney in Columbia, South Carolina, having been admitted to the Bar in September 1972. During the period in which the acts complained of in the complaint occurred, respondent was an associate in the Carolina Community Law Firm, in an expense sharing arrangement with each attorney keeping his own fees. One of the associate attorneys was a staff counsel for the ACLU and was a Counsel of Record in the Pierce case (hereinafter mentioned). She was also a legal consultant of the South Carolina Council on Human Relations, from whom she received compensation, and was an officer of the Columbia Branch of the ACLU, and was a cooperating attorney with the ACLU.

"In response to information received through the South Carolina Council on Human Relations, she contacted one Gary Allen, in Aiken, South Carolina, to arrange for her to talk to people there who had been sterilized. The meeting was held in Aiken during the month of July, 1973, at the office of Gary Allen. Marietta Williams is a Black woman who had consented to be sterilized by Dr. Clovis Pierce. At the meeting in Gary Allen's office, the respondent advised those present, who included Mrs. Williams and other women who had been sterilized by Dr. Clovis H. Pierce, of their legal rights and specifically that they could bring suit for money damages against

Dr. Pierce. There was no further contact between respondent and Mrs. Williams until Mrs. Williams received a letter from respondent dated August 30, 1973. In this letter respondent referred to the meeting in Mr. Allen's office and indicated that the ACLU would like to file a lawsuit for her for money against the doctor who performed the operation. This letter was written on the letterhead of the Carolina Community Law Firm and signed by her as attorney-at-law.

"Prior to the institution of this proceeding, a class action entitled Jane Doe and Mary Roe, on their behalf and on behalf of all others similarly situated, v. Clovis H. Pierce, M.D., et al., was commenced in the United States District Court of South Carolina to declare the acts of the defendant in violation of the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments of the Constitution, to enjoin such acts, and for money damages and attorneys' fees. Respondent contended at a procedural hearing in that case, Judge Blatt's ruling in allowing certain questions to be propounded to a witnesss involving the contact of the respondent with the witness was res judicata or acted as a collateral estoppel against this proceeding, which contention Judge Chapman dismissed as is hereinafter reflected.

"After the filing of this disciplinary proceeding against the respondent, an action was brought in the United States District Court of South Carolina, Columbia Division, to enjoin the members of the Board of Commissioners on Grievances and Discipline, individually and as members of the Board, and the Attorney General

of South Carolina from prosecuting or otherwise processing the complaint in this proceedings. Complaint also prayed for costs, plus attorneys' fees and a declaration that the complaint before the Board was in violation of her rights under the First and Fourteenth Amendments. In dismissing the complaint, on the grounds that the complainant failed to state facts entitling respondent to Federal intervention, Judge Chapman held:

'(1) That to be entitled to injunctive relief against an action pending in a State Court the plaintiff must not only prove bad faith and harassment, which was alleged in this action, but also show that unless restrained the proceeding would cause grave and irreparable injury without providing any reasonable prospect that the State Court would respect and satisfactorily resolve the constitutional issue raised, which was not alleged or proved in the case.

'(2) That Judge Blatt's ruling in Doe v. Pierce, in regards to allowing questions as to solicitation, was solely because they might go to the issue of the appropriateness of the class action, and was in no way res judicata or acted as a collateral estoppel upon the Board or the Supreme Court of South Carolina.'

"The evidence presented indicated that the ACLU has only entered cases in which substantial civil liberties questions are involved, and that contrary to their former practice, they are now asking for fees, in addition to any damages that might be awarded to the plaintiffs, and

that they are never reimbursed out of the damages awarded the plaintiffs.

"The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages.

"Respondent's contention that her actions were protected by the First and Fourteenth Amendments of the United States Constitution gives us some concern, but the other defenses are of little merit and will be disposed of first.

"Respondent's contention that Judge Blatt's ruling in a preliminary hearing in the case of Jane Doe and Mary Roe v. Clovis H. Pierce, M.D., et al., is res judicata or operates to estop the Board of Commissioners on Grievances and Discipline is patently erroneous. As stated in Respondent's own Pre-trial Memorandum, 'Under the Doctrine of res judicata a former judgment operates as a bar against a second action upon the same cause of action, but in a later action upon a different cause of action it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. Lorber v. Vista Irrigation District, 127 F. (2d) 628 (10th Cir. 1942), Exhibitor's Poster Exhange, Inc. v. National Screen Service Corp., 421 F. (2d) 1313 (5th Cir. 1970). The relevant inquiry into the application of this doctrine is identity of

parties, subject matter, cause of action and whether or not the persons against whom estoppel is asserted had a full and fair opportunity for judicial resolution of the said issue.' In the case before Judge Blatt neither of the parties to this proceeding were parties, the subject matter and causes of action were totally different, and finally the complaint in this case had no opportunity for judicial resolution of the issue of solicitation.

"Respondent's contention that the proceedings were initiated in retaliation because of her race, sex and in violation of the First and Fourteenth Amendments are not well taken. While respondent did introduce evidence of her race, sex and certain of her associational activities, there is a total lack of proof that the Board of Commissioners on Grievances and Discipline or the Attorney General issued the complaint against her in retaliation. Respondent properly takes the position that evidence is particularly suspect when it is procured by a party who is acting adversely to the respondent in other litigation. However, the evidence here does not bear out her position that the complaint against her was initiated by the Office of the Attorney General, and even if it had been the Attorney General was not acting adversely to the respondent in other litigation in which she was a party, as the letter written to Mrs. Williams came to the attention of the Attorney General during proceedings in the case of Jane Doe and Mary Roe v. Pierce.

"Respondent contends that Rule 4 of the Rules of Disciplinary Procedure of the South Carolina Supreme Court is vague and overbroad.

Misconduct is defined in Rule 4(b) as violation of any provision of the Canons of Professional Ethics as adopted by this Court from time to time. The Code of Professional Responsibility of the American Bar Association was adopted by the South Carolina Supreme Court on March 1, 1973. Canon 2 of the Code of Professional Responsibility deals specifically with solicitation. While the complaint may have been loosely drafted in that violation of Rule 4(d) of the South Carolina Disciplinary Rules was charged, wherein misconduct was defined as conduct tending to pollute or obstruct the administration of justice or to bring the Courts or the legal profession into disrepute, the specification of the charge was solicitation, and the Panel is of the opinion that violation of any of the disciplinary rules is such an action as would, at least, bring the legal profession into disrepute.

"In any event the Panel is of the opinion that respondent was fully apprised of the charges against her by the complainant, and even if she had not been, the proper procedure would have been by motion to have the complaint made more definite and certain.

"Discriplinary Rule 2-104 (A) provides:

'(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

. . .

'(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.'

"Here, by respondent's own testimony, she met with Mrs. Williams in Aiken, gave unsolicited advice as to what her rights were as she, the respondent, saw them. Then respondent followed up with her letter of August 30, 1973, wherein she solicited Mrs. Williams to join in a class action suit for money damages to be brought by the ACLU. The seeking of and not the acceptance of employment is proscribed by DR 2-104 A (5).

"Disciplinary Rule 2-103 D (5) provides:

'(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

. . .

'(5) Any other non-profit organization that recommends, furnishes or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the service requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

"(a) The primary purpose of such organizations do not include the rendition of legal service.

. . .

"(c) Such organization does not derive a financial benefit from the rendition of legal service by the lawyer."'

. . .

"Testimony at the hearing established that one of, if not the primary purpose of the ACLU, was the rendition of legal services. It was also set out in respondent's Pre-trial Memorandum that the ACLU and its state affiliates on any given day are involved in several thousand active cases throughout the country. It is, also, the policy of the ACLU to ask for attorneys' fees in their lawsuits, and their fees go into its central fund and are used among other things to pay costs and salaries and expenses of staff attorneys.

"Consequently, the Panel is of the opinion that the respondent has violated Disciplinary Rule 2-103 (D)(5)(a)(c) and is therefore guilty of solicitation.

"In the case of NAACP v. Button, 371 U.S. 415, 9 L. Ed. (2d) 405, 83 S. Ct. 328, the facts revealed that the State of Virginia had statutory regulations of unethical conduct of attorneys from 1849, which forbade solicitation of legal business in the form of 'running' or 'capping'. Prior to 1956 no attempt was made to proscribe under such regulations the activities of the NAACP, which had been carried on openly for years. In 1956, however, the Virginia Legislature amended the Virginia Code by passage of Chapter 33, forbidding solicitation of legal business by a 'runner' or 'capper' to include in the definition of 'runner' or 'capper' an agent for an individual or organization which retains a lawyer in connection with an action to which it is a party and in which it has no pecuniary right or liability. The Supreme Court in its decision stated 'the only issue before us is this constitutionality of Chapter 33, as applied to the NAACP.'

"The final query then is was the solicitation protected under the First and Fourteenth Amendments, as earnestly urged by respondent. DR 2-103 (D)(5) specifically recognizes the inherent constitutional problems and provides for the same by allowing an attorney to cooperate with the legal service activities of a 'non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances, and to the extent that controlling constitutional interpretation at the time of

the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met....' Thus, DR 2-103 (D)(5) prohibits solicitation except where controlling constitutional interpretations mandate the allowance of the specific service. Furthermore, in order for an attorney to solicit on behalf of a non-profit organization, the four conditions of DR 2-103 (D)(5) (a--d) must be met unless application of these four conditions has, jointly or severally, been prohibited by controlling constitutional interpretations.

"The first of the above mentioned four conditions is that '[t]he primary purpose of [non-profit] organizations do not include the rendition of legal services.' The ACLU, the non-profit organization herein involved, by its own admission, may have several thousand lawsuits in progress at any one day and they classify themselves as private attorneys general. It follows, therefore, that its primary purpose is the rendition of legal services. This Panel has not found, nor has it been furnished with, any case showing that a state is prohibited, on constitutional grounds, from regulating the activities of attorneys' soliciting clients on behalf of a non-profit organization which has as one of its primary purposes the rendition of legal services. Respondent relies on four cases: NAACP v. Button, supra, 371 U.S. 415, 9 L. Ed. (2d) 405, 83 S.Ct. 328; Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 12 L.Ed. (2d) 89, 84 S.Ct. 1113; United Mine Workers v. Illinois Bar Association, 389

U.S. 217, 19 L.Ed. (2d) 426, 88 St.Ct. 353 and United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 28 L.Ed. (2d) 339, 91 S. Ct. 1076. None of the four non-profit organizations involved in the above cases, has as one of its primary purposes, the rendition of legal services. In NAACP v. Button, the court addresses itself to the legal services rendered by the NAACP. However, the court appears to characterize the NAACP as a political, rather than legal organization, and depicts litigation as an adjunct to the overriding political aims of the organization.

"That the American Bar Association considered the aspect of the NAACP case is obvious from the fact that the second of the above conditions allows solicitation where 'the recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.' As pointed out litigation is the primary purpose of the ACLU; it is not simply incidental to its primary purpose. This condition is not constitutionally prohibited, but is rather constitutionally required by NAACP v. Button.

"In that there is no question but that the respondent has not violated the second and third conditions of DR 2-103 (D)(5), there is no need to question whether they are constitutionally prohibited or not.

"Respondent has, therefore, violated DR 2-103 (D)(5)(a) by attempting to solicit a client for a non-profit organization which, as

its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization. If respondent's contention that her actions were protected by the First and Fourteenth Amendments of the Constitution were upheld, it would amount to a holding that the pertinent provision of Canon 2 of the Code of Professional Responsibility was unconstitutional, which we are not prepared to do."

It is therefore ORDERED that petitioner, Edna Smith, be and she hereby is publicly reprimanded.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J.B. Ness A.J.

s/ Wm. L. Rhodes, Jr. A.J.

s/ George T. Gregory, Jr. A.J.

STATE OF SOUTH CAROLINA)	BEFORE THE BOARD
)	OF COMMISSIONERS
COUNTY OF RICHLAND)	ON GRIEVANCES AND
	DISCIPLINE
In the Matter of:)	
)	
John W. Williams, Jr.,)	
Secretary of the Board)	
of Commissioners on)	
Grievances and Dis-)	
cipline,)	
Complainant,)	
)	
-vs-)	PANEL REPORT
)	
Edna Smith,)	
)	
Respondent.)	

This proceeding was commenced on or about the 10th day of October, 1974, by a Notice and Complaint in which the Respondent was charged with solicitation in violation of the Canons of Professional Ethics. Respondent answered, denying the charge, and setting up the following affirmative defenses:

1. That her actions were protected by Canon 2 of the Code of Professional Ethics;

2. That her actions were protected by the First and Fourteenth Amendments of the Constitution of the United States;

3. That the Board of Commissioners on Grievances and Discipline was estopped by

prior proceedings in Doe v. Pierce, No. 74-75, United States District Court, South Carolina, and alternatively that such proceedings were res judicata as to the subject matter in the case;

4. That this proceeding was instituted in retaliation because of her race, sex and associational activities with the ACLU, in violation of the First and Fourteenth Amendments of the United States Constitution;

5. That Rule 4 of the Rules of Disciplinary Procedure of the South Carolina Supreme Court is vague and overbroad.

The matter came on for hearing before the undersigned panel on the 20th day of March, 1975, at Columbia, South Carolina.

The Complainant was represented by Richard B. Kale, Jr., Esquire, Assistant Attorney General of Columbia, South Carolina. The Respondent was represented by Laughlin McDonald, Esquire, ACLU Foundation, Inc., Atlanta, Georgia, and Ray P. McClain, Esquire, Charleston, South Carolina.

The Panel has carefully considered the evidence and the arguments and briefs of Counsel, and makes the following Report:

* * *[1]

In addition to the concern which this case has given the Panel in its findings with

1. The omitted portion of the panel report is quoted without change (with the exception of adding full citations) in the opinion of the Supreme Court, 3a-14a.

reference to the matter of violation of the Code of Professional Responsibility, the Panel has been impressed by the fact that the Respondent's activities were neither aggravated nor widespread. The record before the Panel does not indicate any continuous activity on the part of the Respondent, which is prohibited by the Canons of Professional Ethics. The violation as found by the Panel from the record is isolated to one particular class action.

After considering the entire record, and after giving the Respondent the benefit of the doubt, it is the recommendation of the Panel that the Respondent be given a private reprimand.

Respectfully submitted,

s/ H. Hayne Crum

s/ Melvin B. McKeown

s/ John B. McCutcheon

Members of Panel.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court of South Carolina, Rule on Disciplinary Procedure, Section 4:

4. Misconduct Defined.

Misconduct, as the term is used herein, means any one or more of the following:

(a) violation of any provision of the oath of office taken upon admission to the practice of law in this State;
(b) violation of any of the Canons of Professional Ethics as adopted by this Court from time to time;

(c) commission of a crime involving moral turpitude;
(d) conduct tending to pollute or obstruct the administration of justice or to bring the courts or the legal profession into disrepute.
(e) emotional or mental stability so uncertain, as in the judgment of ordinary men, would render a person incapable of exercising such judgment and discretion as necessary for the protection of the rights of others and/or their property or interest in property.

American Bar Association, Code of Professional Responsibility, adopted by Supreme Court of South Carolina, Disciplinary Rule 2-103(D):

DR 2-103 Recommendation of Professional Employment.

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(1) A legal aid office or public defender office:
(a) Operated or sponsored by a duly accredited law school.
(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(4) A bar association representative of the general bar of the geographical area in which the association exists.

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member of beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

American Bar Association, Code of Professional Responsibility, adopted by Supreme Court of South Carolina, Disciplinary Rule 2-104:

DR 2-104 - Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D) (1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2-103(D) (1), (2), or (5) may represent a member or beneficiary thereof

to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

STATE OF SOUTH CAROLINA)	BEFORE THE BOARD OF
)	COMMISSIONERS ON
COUNTY OF RICHLAND)	GRIEVANCES AND DISCIPLINE
In the Matter of:)	
)	
John W. Williams, Secretary)	
of the Board of Commissioners)	
on Grievances and Discipline,)	
)	
Complainant,)	
)	
vs.)	COMPLAINT
)	
Edna Smith,)	
)	
Respondent.)	

Complainant alleges:

I.

The Complainant is the Secretary of the Board of Commissioners on Grievances and Discipline and a duly licensed attorney in the State of South Carolina, and the Respondent is engaged in the practice of law as a duly licensed attorney who resides or maintains an office in the County of Richland, State of South Carolina.

II.

On information and belief the Respondent committed the following act of misconduct or has indulged in the following practice which

tends to pollute the administration of justice or to bring the legal profession or the courts into disrepute:

A. On or about August 30, 1973, Respondent wrote a letter to Mrs. Marietta Williams of 347 Sumter Street, Aiken, South Carolina, a copy of which is attached, by the terms of which Respondent informed Mrs. Williams that "The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation." Complainant is informed and believes that the foregoing constitutes solicitation in violation of the Canons of Ethics.

WHEREFORE, Complainant prays that the Board of Commissioners on Grievances and Discipline consider these allegations and make such disposition as may be appropriate.

s/ John W. Williams
Complainant

[Verification Omitted]

August 30, 1973

Mrs. Marietta Williams
347 Sumter Street
Aiken, South Carolina 29801

Dear Mrs. Williams:

You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.

Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me collect at 254-8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day) collect.

I want to assure you that this interview is being done to show what is happening to women against their wishes, and is not being done to harm you in any way. But I want you to decide, so call me collect and let me know of your decision. This practice must stop.

About the lawsuit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf.

Sincerely,

s/ Edna Smith
Edna Smith
Attorney-at-Law

[Filed April 15, 1977]

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

In the matter of Edna Smith,

Petitioner.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Edna Smith, the petitioner above-named, hereby appeals to the Supreme Court of the United States from the final order imposing discipline on her entered in this matter on March 17, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

s/ Ray P. McClain
RAY P. McCLAIN

Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1335 [Filed April 30, 1976]

American Civil Liberties Union and Jane Koe,

Appellants,

versus

O. Harry Bozardt, Jr., H. Hayne Crum, Joseph O. Rogers, Jr., Marion H. Kinon, Edward M. Royall, II, George F. Coleman, Robert A. Hammett, Thomas J. Thompson, Conning B. Gibbs, Jr., Lowell W. Ross, Frank E. Harrison, J. Malcolm McLendon, C. Thomas Wyche, William L. Bethea, John B. McCutcheon, Melvin B. McKeown, Jr., individually and as members of the Board of Commissioners on Grievances and Discipline, and their successors; and the Attorney General of South Carolina,

Appellees.

O R D E R

Upon consideration of the petition for rehearing it is ORDERED, with the consent and approval of Judge Bryan and Judge Field, that the petition for rehearing be and the same hereby is denied.

Upon consideration of the suggestion for a rehearing en banc, a poll of the court having been requested by a regular active member of the court, it was established that a majority

of the regular members of the court in active service did not favor rehearing en banc,

NOW, THEREFORE, IT IS ORDERED that the suggested rehearing en banc be and the same hereby is denied.

For the court:

s/ Herbert S. Boreman
Senior United States
Circuit Judge.

WINTER, Circuit Judge, dissenting:

I dissent from the denial of rehearing en banc.

This is a classic case for such treatment. It presents a question of exceptional importance, Rule 35(a), F.R.A.P., and there is substantial reason to conclude that the case is wrongly decided.

I.

The panel holds that the principles set forth in Younger v. Harris, 401 U.S. 37 (1971), and its progeny, oust federal jurisdiction of an action under 42 U.S.C. §1983 for declaratory and injunctive relief where there is a pending a state administrative proceeding, the object of which is to determine if the individual plaintiff should be subject to disciplinary action, not criminal sanctions, for alleged misconduct as a member of the bar.*

* At the outset, I express serious reservations that even if Younger applies, it would support the result reached by the majority. Younger appears to recognize that it is inapplicable where a plaintiff shows "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54. The complaint was dismissed notwithstanding plaintiffs' allegations that the disciplinary inquiry "was initiated against plaintiff Koe in bad faith for purposes of and has the effect of, harassment and retaliation and chilling and discouraging the activities of
(footnote continued to next page)

What is at stake in the state proceedings is the right of a licensee to practice her profession; there is no claim that, if the individual plaintiff did the things with which she is charged, any criminal statute of South Carolina was infringed.

Under presently decided controlling authorities, the outermost reach of the Younger principle of federal non-intervention was Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which held that a district court should not exercise jurisdiction to determine the constitutionality of a statute making a movie theatre which shows obscene films a nuisance and requiring its closing when there was pending an earlier filed state civil proceeding under the statute. Huffman recognized federal civil injunctive relief ought to be more conservatively granted when the object of relief was a state officer enforcing a state statute than in a case between private litigants--a concept implicit in Younger--but that Younger rested also "upon the traditional reluctance of courts of equity ... to interfere with a criminal prosecution." 420 U.S. at 640. Thus, the rationale articulated in Huffman was that

> [W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of

(footnote continued from preceding page)
ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain counsel or take legal action."

> Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding ... while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws. 420 U.S. 604-05.

Huffman does not govern this case, and Younger should not be applied here. Although the district court ought not to enjoin the administrative proceeding unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted because the proceeding is criminal or quasi-criminal in nature. I think that the panel's decision flies in the teeth of Mitchum v. Foster, 407 U.S. 225 (1972) (holding that an action under 42 U.S.C. §1983 was an exception to the anti-injunction statute, 28 U.S.C. §2283); Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that a federal court could enjoin a proceeding before the Alabama Board of Optometry where, as here, plaintiffs allege bias and harassment); and Steffel v. Thompson, 415 U.S. 452 (1974) (holding that declaratory relief, such as that prayed here, could be granted where a state criminal prosecution was threatened but not pending.) See also, Taylor v. Kentucky State Bar Assoc., 424 F.2d 478, 482 (6 Cir. 1970) (holding that bar disciplinary proceedings at the administrative level are not "proceedings in a state court.")

II.

Only the individual plaintiff is the subject of the state administrative inquiry; the ACLU is not. Yet the latter has a substantial interest in the state proceedings. The impact of the state proceedings on the willingness of lawyers to volunteer and cooperate with ACLU in providing legal assistance to those whose constitutional rights have been violated is manifest. The services of ACLU -- assisting lay persons to recognize their legal rights and making counsel available -- are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities. United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). See In re Ades, 6 F.S. 467, 475-76 (D. Md. 1934), for a persuasive historical compilation by a district judge, later a distinguished member of this court.

It seems to me that under these circumstances Steffel holds that even if Younger

is a bar to jurisdiction over the claim of the individual plaintiff, the claim of ACLU can and should be litigated. See also Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

III.

Thus, I would conclude that for these several reasons the panel's decision is incorrect. We should grant rehearing en banc and reach a different result.

Judge Craven and Judge Butzner authorize me to say that they join in these views.